

The Honorable Barbara J. Rothstein

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

WSOU INVESTMENTS, LLC,

Plaintiff,

v.

F5 NETWORKS, INC.,

Defendant.

Civil Action No. 2:21-cv-00126-BJR

ORDER DENYING DEFENDANT'S  
MOTION FOR ATTORNEYS' FEES

**I. INTRODUCTION**

When this patent infringement action originally commenced in January 2021, Plaintiff WSOU filed four separate complaints alleging that Defendant F5 Networks had infringed four of WSOU's patents. Since then, Plaintiff has voluntarily dismissed three of the complaints. The Court dismissed the remaining case when it granted summary judgment for Defendant in December 2022. Following the entry of judgment, Defendant informed the Court of its intent to file a motion for attorneys' fees under 35 U.S.C. § 285, and the Court set a briefing schedule. Defendant has since filed a motion under § 285, and Plaintiff has responded. Having reviewed the motion, the opposition thereto, and the relevant legal authorities, the Court will deny Defendant's motion for attorneys' fees. The reasoning for the Court's decision follows.

## II. BACKGROUND

### A. The Claim Construction and Summary Judgment Orders

The Court’s summary judgment order in December 2022 found that Defendant’s “BIG-IP” and related products did not infringe Plaintiff’s patent 7,548,945 (the “945 patent”). The Court described the 945 patent in detail in its claim construction order:

Patent ‘945 is described as “[a] [s]ystem, apparatus, and method using a master device in a cluster of devices to select a network device to respond to a DNS query.” Dkt. No. 134 at 3 (citing Dkt. No. 100-9 at ECF 2). Every device connected to the internet has a unique IP address—a complicated numerical sequence—that identifies it to other devices. Devices include personal cell phones and computers, as well as email and web servers that personal devices must contact in order to interact with their email or a website.

A domain name service (“DNS”) allows users to connect (i.e., query) to a particular site on the internet by simply typing in the domain name (e.g., CNN.com) rather than the specific numerical IP address of the server the user’s device needs to contact.

Large networks, such as popular websites, require more than one server to handle the volume of queries they receive. When there is a “cluster” of multiple servers, there must be a system for efficiently assigning queries to the server that is best equipped to handle them at the time the queries are received—a process known as “load balancing”—so that no one server becomes overloaded. An Authoritative Name Server (“ANS”) is a device that performs this function. When it receives DNS queries, it assigns them to the other servers. The patented technology before the Court was designed as a modification and improvement of the existing system. Instead of designating a single, separate device to permanently serve as the ANS, the patented technology allows any device in the cluster to serve as a “master device” as needed. Additionally, the patented technology claims to enhance the communication between the master and other devices, with the latter sending status information to the master device in real time. The master device can then make more informed decisions in executing its load-balancing function.

Dkt. 89 at 14-15. The Court’s summary judgment order hinged on whether Plaintiff could establish that Defendant’s products possessed a “master device” like the one described in the patent. More precisely, the Court analyzed whether “the 945 patent necessarily requires that *any* device in a cluster of devices can serve as the master device at any given time, and thus that the product can only infringe the patent if it possesses this capability.” Dkt. 216 at 5 (emphasis in original). The

1 Court referred to this capability as “interchangeability.” *Id.* Plaintiff argued that “the *Markman*  
2 Order is clear that interchangeability is not required in the construction itself, even if the Court  
3 stated that it is permitted.” Dkt. 173 at 9 (citing Dkt. 89 at 15 (“[T]he device playing the master  
4 role *may* change as needed” (emphasis in Plaintiff’s brief))). The Court rejected this interpretation  
5 and found that “flexibility and interchangeability . . . was a key part of the Court’s definition of  
6 ‘master device.’” *Id.* at 6. Plaintiff’s interpretation relied heavily on “the word ‘may’ in the phrase  
7 ‘the device playing the master role *may* change as needed’ as supporting its argument that  
8 interchangeability is permitted but not required.” *Id.* (citations omitted). The Court found this  
9 reliance to be misplaced, stating that “the ‘may’ refers to options users have that the prior art did  
10 not give them [namely, the interchangeability of devices]—it does not suggest that the existence of  
11 this capability itself is optional in the design of the technology.” *Id.*  
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14 The Court thus found that, in order to succeed on their patent infringement claim, Plaintiff  
15 needed to show that Defendant’s products possessed the interchangeability described in the patent.  
16 The Court then proceeded to review each piece of evidence Plaintiff had cited purporting to show  
17 that this interchangeability existed. None of the evidence Plaintiff cited raised a genuine dispute of  
18 fact as to interchangeability. Even if taken as true, Plaintiff’s evidence would not have established  
19 that Defendant’s product possessed the necessary capability. On this basis, the Court granted  
20 summary judgment for Defendant.  
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22 Now before the Court is Defendant’s motion for attorneys’ fees it has incurred since the  
23 Court’s claim construction order in January 2022.

### 24 III. LEGAL STANDARD

25 Attorneys’ fees in patent litigation are awarded only in “exceptional cases.” *Octane*  
26 *Fitness, LLC v. ICON Health & Fitness*, 572 U.S. 545 (2014). “Exceptional” cases fall into two  
27 categories. The first category involves litigation misconduct, where a plaintiff’s prosecution of the

1 case is unreasonable and often consists of “independently sanctionable conduct.” *Id.* at 555. The  
2 second category involves the strength of a plaintiff’s claims and the reasonableness of their filing  
3 and pursuing the action. If the totality of the circumstances in a case evidence “subjective bad  
4 faith” or a plaintiff brings “exceptionally meritless claims,” attorneys’ fees may be appropriate. *Id.*  
5 Exceptionally meritless claims have been described as “objectively baseless” and “frivolous.”  
6 *MarcTec, LLC v. Johnson & Johnson*, 664 F.3d 907, 917 (Fed. Cir. 2012). In general, exceptional  
7 cases under either category are “rare.” *Octane Fitness*, 572 U.S. at 555. Deciding whether a case  
8 is exceptional and attorneys’ fees should be awarded is within the discretion of the trial court, and  
9 “no specific evidentiary burden” applies to a motion seeking fees. *Id.* at 557.

#### 11 IV. DISCUSSION

##### 12 A. The Parties’ Positions

13 Defendant’s motion for attorneys’ fees argues that this case is exceptional under the second  
14 *Octane Fitness* category—specifically, that Plaintiff’s claim with respect to the 945 patent was  
15 obviously meritless after the Court defined the term “master device” at the *Markman* hearing.  
16 Defendants’ argument thus focuses only on the claim on which the Court granted summary  
17 judgment, and not on the three other related infringement actions that were voluntarily dismissed.  
18 Defendants also do not make an argument under the first category of exceptional cases by claiming  
19 that attorneys’ fees are warranted based on Plaintiff’s conduct during the litigation. Therefore, the  
20 only issue presented by Defendants’ motion is whether Plaintiff’s 954 patent infringement claim  
21 was so clearly meritless that Plaintiff should have known after the *Markman* hearing that it had no  
22 chance of successfully litigating the case.  
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25 Defendant’s brief notes that the Court, in its summary judgment order, focused in part on  
26 the “plain language” of the patent claims. Among other things, Defendant points to the Court’s  
27 statement that “Plaintiff’s interpretation of the Court’s construction defies the plain language of the

1 [claim construction] order.” *Id.* (citing Dkt. 216 at 6). Defendant argues that the plain meaning of  
2 the claims should have been readily understandable to Plaintiff without the need to further litigate  
3 it. Dkt. 225 at 6. Defendant further claims that—in the months between claim construction and  
4 summary judgment—Plaintiff did not attempt to support its position on interchangeability. *Id.* at  
5 5. For instance, “[Plaintiff’s] infringement contentions were completely silent on the issue of  
6 ‘interchangeability.’” *Id.* Finally, although not explicitly alleged, Defendant implies that Plaintiff  
7 brought this action in bad faith and that a fees award is needed to deter future vexatious litigation.  
8 *Id.* at 12.

10 Plaintiff devotes most of its brief to defending the reasonableness of its interpretation of the  
11 patent claims and its argument in opposition to summary judgment. *See* Dkt. 229 at 1-10. Plaintiff  
12 essentially argues that the Court was wrong to grant summary judgment for Defendant and that, at  
13 the very least, it made a plausible, good-faith argument. *Id.* Plaintiff also counters Defendant’s  
14 accusation that Plaintiff never attempted to develop support for its interchangeability argument by  
15 noting that Defendant’s filings, too, were silent on the issue until the eve of its summary judgment  
16 motion. *Id.* at 10. Plaintiff claims that Defendant “did not dispute [interchangeability] until months  
17 after claim construction,” and that Defendant’s invalidity contentions and opening expert report  
18 appeared to indicate that it agreed with Plaintiff’s characterization of the issue. *Id.* at 3, 10.  
19 Essentially, Plaintiffs argue that its filings did not make a counterargument as to interchangeability  
20 because Defendant had not raised an argument to counter.

## 23 **B. Analysis**

24 The Court finds that this case does not qualify as exceptional. In its summary judgment  
25 ruling, the Court rejected Plaintiff’s infringement claim but did not find it “baseless” or “frivolous.”  
26 *MarcTec*, 664 F.3d at 916-19. The same goes for Plaintiff’s interpretation of the term “master  
27 device,” specifically. Dkt. 216 at 5-6. Plaintiff’s alternative interpretation—which would have

made interchangeability an optional rather than mandatory to accused products—was (in the Court’s view) incorrect, but not implausible. The Court noted that it viewed Plaintiff’s interpretation as inconsistent with the plain language of the patent claims, but many non-frivolous cases in and outside of patent law involve competing interpretations purportedly supported by the plain language of whatever is being interpreted. The fact that Plaintiff’s interpretation did not prevail and that Plaintiff lost on summary judgment is not “exceptional” but in fact exceedingly ordinary. As the Supreme Court stated in *Octane Fitness*, fee awards are not should not be used as a “penalty for failure to win a patent infringement suit.” *Octane Fitness*, 134 S. Ct. at 1753; *see also Mobiloc, LLC v. Neutron Holdings, Inc.*, 2022 WL 874738, at \*3 (W.D. Wash. Mar. 24, 2022) (“Although the Court ruled against Plaintiff on summary judgment, the Court did not find Plaintiff’s infringement position . . . to be frivolous or raised in bad faith.”); *Corus Realty Holdings, Inc. v. Zillow Group*, 2020 WL 4041108, at \*5 (W.D. Wash. July 17, 2020) (denying fees’ motion where defendant had prevailed on summary judgment but “the court [did] not find evidence of baselessness or frivolousness”).


Plaintiff cites a persuasive case, *EON*, in which the Northern District of California noted that it had found the unsuccessful plaintiff’s argument to be a “quite stretched” such that “few patentees would pursue it” and that “it should have been plain enough from the surrounding context and the Court’s actual construction that” Plaintiff’s interpretation did not make sense. *EON Corp. IP Holdings LLC v. Cisco Sys.*, 2014 WL 3726170, at \*5 (N.D....) Nevertheless, the court “[could not] quite conclude that no reasonable patentee could see an opening in the Court’s claim construction order through which the argument be squeezed.” *Id.* The Court finds this to be a helpful illustration of what an “exceptionally meritless” case looks like. A party’s argument may be incorrect—even clearly incorrect—but fees are justified only when the implausibility of the

1 argument is so obvious that no reasonable patentee would make it, such that the party that did make  
2 it is the “exception” to the rule. Here, Plaintiff’s interchangeability argument at summary judgment  
3 was not exceptionally meritless.<sup>1</sup> A reasonable patentee could have elected to make their argument  
4 rather than voluntarily dismiss or settle the case. Accordingly, attorneys’ fees under § 285 are not  
5 warranted, and Defendant’s motion is denied.  
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### 7 CONCLUSION

8 For the foregoing reasons, Defendant’s motion for attorneys’ fees under 35 U.S.C. § 285  
9 (Dkt. 225) is denied.

10 DATED this 29th day of May, 2023.

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13 BARBARA J. ROTHSTEIN  
14 UNITED STATES DISTRICT JUDGE  
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25 <sup>1</sup> The Court is also persuaded that the issue of interchangeability was not raised by Defendant until  
26 it began preparing its summary judgment motion and that this weighs against awarding fees. *Stone*  
27 *Basket Innovations, LLC v. Cook Med. LLC*, 892 F.3d 1175, 1181 (Fed. Cir. 2018) (denying fees  
in part because movant had failed to raise the dispositive issue earlier in the litigation).